

THIS DECISION IS NOT  
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Middleway Enterprises Limited

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Serial No. 78/062,505

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Henry S. Kaplan of Feldman, Gale & Weber for applicant.

Jennifer M. Martin, Trademark Examining Attorney, Law  
Office 116 (Meryl Hershkowitz, Managing Attorney).

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Before Quinn, Walters and Bottorff, Administrative  
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Middleway Enterprises  
Limited to register the mark HYDROSOIL for "soil  
conditioners for agricultural, domestic or horticultural  
use."<sup>1</sup>

The Trademark Examining Attorney has refused  
registration under Section 2(d) of the Trademark Act on the

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<sup>1</sup> Application Serial No. 78/062,505, filed May 8, 2001, alleging  
a bona fide intention to use the mark in commerce.

ground that applicant's mark, if applied to applicant's goods, would so resemble the previously registered mark HYDRO-SOL for "fertilizers"<sup>2</sup> as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney filed briefs. An oral hearing was not requested.

Applicant essentially argues that the cited mark is weak and entitled to a narrow scope of protection which does not extend to applicant's mark. Applicant goes on to argue that its mark "creates an immediate, clear and vastly different mental image from that of the cited reference and the marks also differ in sound and appearance." Applicant specifically points to the differences between "the well known and commonly understood meaning of the English word 'soil' as opposed to the equally well known meaning of the English word 'sol.'" Applicant further argues that purchasers are sophisticated, asserting that "[t]here is nothing casual about taking care of plants and flowers, the money spent to do so and the care people take in regard to their plants and flowers." In support of its position, applicant submitted printouts of six third-party

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<sup>2</sup> Registration No. 1,250,790, issued September 13, 1983; combined Sections 8 and 15 affidavit filed.

registrations of SOL marks retrieved from the TESS database,<sup>3</sup> and dictionary definitions of the terms "sol" and "soil."<sup>4</sup>

The Examining Attorney maintains that the marks are confusingly similar, and that the goods are related and travel in the same channels of trade to the same purchasers, not all of whom are sophisticated. In support of the refusal, the Examining Attorney introduced third-party registrations which show that a party has registered a single mark for both fertilizers and soil conditioners.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of

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<sup>3</sup> Applicant also submitted a listing (February 14, 2002 response) of third-party HYDRO registrations, to which the Examining Attorney objected, and a TESS printout (June 24, 2002 request for reconsideration) of the summary of the search for SOL marks which indicates that 438 records were found. In reaching our decision, we have considered only the six third-party registrations for which copies were furnished. Mere listings or search summaries are not sufficient to make third-party registrations of record; rather, copies of the registrations must be furnished to properly make them of record. In re Classic Beverage, Inc., 6 USPQ2d 1383, 1386 (TTAB 1988).

<sup>4</sup> Applicant did not submit the dictionary pages in support of the definitions it has relied upon. Nonetheless, such evidence is proper subject matter for judicial notice and, accordingly, we have considered the dictionary definitions. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods.

Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to compare applicant's "soil conditioners for agricultural, domestic or horticultural use" with registrant's "fertilizers." Applicant does not specifically dispute that the goods are similar, and we readily agree with the Examining Attorney that the goods are closely related. Both are used to enhance soil for growing purposes. The third-party registrations, submitted by the Examining Attorney, which are based on use in commerce and which individually cover both soil conditioners and fertilizers, serve to suggest that the listed goods are of a type which may emanate from a single source. See: In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

Given the close relationship between the goods, we find that they would travel in the same channels of trade to the same classes of purchasers. Although applicant would have us conclude that the purchasers of soil conditioners and fertilizers are sophisticated, we decline to do so. The classes of purchasers would include

homeowners and other do-it-yourself gardeners who, in our view, would exercise nothing more than ordinary care in purchasing such goods.

Turning next to compare applicant's mark HYDROSOIL with registrant's mark HYDRO-SOL, there are obvious similarities between the marks. These similarities clearly outweigh the differences pointed to by applicant. Although there has been discussion between applicant and the Examining Attorney regarding dominant portions of the marks, we do not view either mark as having a dominant portion. Rather, when both marks are considered in their entireties, it is obvious that they are similarly constructed; both begin with the identical term HYDRO, and end in similar sounding and looking terms. When considered in their entireties, the marks differ only by a hyphen and the single letter "I." In finding that the marks are similar, we have kept in mind the fallibility of purchasers' memories, and that they normally retain a general rather than a specific impression of trademarks encountered in the marketplace.

We have considered the third-party SOL registrations and the dictionary evidence which shows different meanings for the terms "SOL" and "SOIL." The six third-party registrations are of limited probative value. The

registrations do not establish that the marks shown therein are in use, much less that consumers are so familiar with them that they are able to distinguish among such marks by focusing on slight differences between them. Smith Bros. Manufacturing Co. v. Stone Manufacturing Co., 476 F.2d 1004, 177 USPQ 462 (CCPA 1973). With respect to the dictionary evidence, we acknowledge that the terms "sol" and "soil" have different meanings. However, due to the similarities between the marks in terms of overall sound and appearance, this difference in meaning is outweighed by the similarities.

We conclude that consumers familiar with registrant's fertilizers sold under the mark HYDRO-SOL would be likely to mistakenly believe, if they were to encounter applicant's mark HYDROSOIL for soil conditioners, that the goods originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.